

## St. John's Law Review

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Volume 73  
Number 1 *Volume 73, Winter 1999, Number 1*

Article 11

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March 2012

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#### Recommended Citation

Fierro, Michael R. (1999) "Condominium Association Remedies Against a Recalcitrant Unit Owner," *St. John's Law Review*: Vol. 73 : No. 1 , Article 11.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol73/iss1/11>

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# NOTES

## CONDOMINIUM ASSOCIATION REMEDIES AGAINST A RECALCITRANT UNIT OWNER

### INTRODUCTION

Man has always felt the need to live communally, in one form or another.<sup>1</sup> For modern America, this need could not be completely satisfied until it became tax-deductible.<sup>2</sup> Thus, the condominium was born.<sup>3</sup>

The condominium concept did not catch on in the United States until the 1960s.<sup>4</sup> Prior to that time, the cooperative,

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<sup>1</sup> Witness, for example, the cave-dwellers and the nomads. Condominiums may have existed under Roman law, but this point is disputed. See Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 987-88 (1963) (noting that the origins of the condominium pre-date Caesar); William Schwartz, *Condominium: A Hybrid Castle in the Sky*, 44 B.U. L. REV. 137, 141 (1964) (relating the origin of the condominium to the Roman era); see also William K. Kerr, *Condominium-Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 3 (1963) (noting a claim that the condominium concept can be traced back to the ancient Hebrews in the Fifth Century B.C.).

<sup>2</sup> See I.R.C. § 163(h)(3) (1994) (allowing deductions for the interest portion of qualified mortgage indebtedness).

<sup>3</sup> While their first existence in fact is widely disputed, condominiums were first afforded statutory recognition by the Code Napoleon in 1804. See Kerr, *supra* note 1, at 3. The condominium concept did not take root in this country until experimentation by Puerto Rico and an amendment of the National Housing Act authorized another requisite to the satisfaction of modern man—insurance. See *id.* at 1; § 119 of the National Housing Act of 1964, 78 Stat. 769, 780 (amending § 234 of the National Housing Act, 12 U.S.C. § 1715y (1994), and allowing insurance for a “multi-family project,” even if it was not a “multi-family structure”).

<sup>4</sup> See Howard E. Kane & W. Richard Helms, *The Illinois Condominium Property Act*, 1970 U. ILL. L. F. 157, 157 (1970) (“By the end of 1963, thirty-nine states had passed condominium acts, with thirty-two states adopting such legislation in 1963 alone.”); Kerr, *supra* note 1, at 1. Vermont was the final state to pass legislation in 1969. See *id.* Presently, all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands have passed enabling statutes. See Guy Batsel, Note, *Florida Condominiums-Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 FLA. L. REV. 350, 350 (1973).

which in the United States dates back to the late nineteenth century,<sup>5</sup> was the only form of community living to gain widespread acceptance through the first half of the twentieth century.<sup>6</sup> While the cooperative satisfied the needs of the time,<sup>7</sup> its basic structure<sup>8</sup> cried out for a suitable replacement. One could never be secure knowing that all one actually owned was a leasehold interest. The condominium, on the other hand, afforded unit owners an actual fee estate.<sup>9</sup> This individual ownership, however, creates its own problems for the condominium associations and the jurisdictions which enable them.<sup>10</sup> Since the unit owner of a condominium is a title holder in fee, dealing with the recalcitrant unit owner can pose particular problems for the condomin-

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<sup>5</sup> The earliest reported case involving a cooperative apartment is *Barrington Apt. Ass'n v. Watson*, 38 Hun 545 (N.Y. 1886).

<sup>6</sup> See Aaron M. Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1106 (1969) (noting cooperatives have been used for decades). Even then, acceptance was limited to only a few major metropolitan areas, primarily New York. See Berger, *supra* note 1, at 991-92. For a discussion of the different types of available cooperatives, see generally Phillip N. Smith, Comment, *A Survey of the Legal Aspects of Cooperative Apartment Ownership*, 16 U. MIAMI L. REV. 305 (1961).

<sup>7</sup> In particular, cooperatives provided a solution to the shortage of affordable housing following both World Wars. See Note, *Co-operative Apartment Housing*, 61 HARV. L. REV. 1407, 1407 (1948). Unfortunately, the Great Depression wiped out a large portion of cooperatives created after World War I. See *id.* at 1410. After World War II, cooperatives' popularity was spurred on by a landowner's ability to remove his apartments from rent-ceiling regulations by converting them to cooperatives. See 15A AM. JUR. 2D *Condominiums & Cooperative Apartments* § 61 (1976); Robert Marks & Kenneth J. Marks, *Coercive Aspects of Housing Cooperatives*, 42 U. ILL. L. REV. 728, 728 (1948).

<sup>8</sup> Cooperatives are structured so that the cooperator is essentially a tenant. See *infra* Part I.

<sup>9</sup> See *infra* Part I.

<sup>10</sup> Not the least of these problems is how to define the estate. Many jurisdictions refer to the unit owner's entire estate simply as a "condominium," so that, in order to assess real estate taxes, the taxing legislation will generally read similar to, "each condominium owned in fee shall be separately assessed to the owner thereof." CAL. REV. & TAX. CODE § 2188.3 (Deering 1995). Alternatively, in some jurisdictions, such as the District of Columbia, "condominium" means "the ownership of single units in a multi-unit structure with common elements," 77 Stat. 449, 449 § 2(b)(1963), a "condominium unit" is the individual apartment, and "unit and the percentage of undivided interest in the common areas and facilities appurtenant to such unit," 77 Stat. 449, 460 § 25(a) (1963), refers to the unit owner's entire interest. There, the relevant taxing provision is more akin to, "[a]ll real property taxes . . . shall be levied on each apartment and its respective appurtenant fractional share or percentage of the land, general common elements and limited common elements where applicable as such apartments and appurtenances are separately owned, and not on the entire horizontal property regime." IOWA CODE ANN. § 4998.11 (West 1991).

ium association which do not exist for the cooperative association.<sup>11</sup>

This Note will discuss the remedies available to a condominium association when dealing with a recalcitrant unit owner who violates a restriction imposed by the association, and the means by which those remedies may be enforced. Of particular importance to this analysis is the standard of review which courts may use in determining whether to enforce the restriction in question at all.<sup>12</sup> In addition, this Note covers the ability of a condominium association to recover attorney's fees.<sup>13</sup>

Part I begins with a brief comparison of the differences between condominiums and cooperatives, focusing on why the structure of a condominium makes dealing with a recalcitrant unit owner particularly difficult. Part II covers the various approaches a court may take in determining whether a given restriction is valid and enforceable. Part III is a discussion of the remedies available to condominium associations, in particular the ability to suspend voting rights, privileges, and services, and the ability to assess monetary sanctions or fines. Finally, to help the association be more effective in its efforts, the defenses the unit owner may raise as well as suggestions to the association are discussed in Parts IV and V, respectively.

## I. CONDOMINIUMS V. COOPERATIVES

Whereas the major characteristics of a condominium are individual ownership of a unit, an undivided interest in common areas, and an agreement among the unit owners regulating the administration and maintenance of property,<sup>14</sup> a cooperative is defined as a multi-unit dwelling where each resident has an in-

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<sup>11</sup> The cooperator holds only a leasehold estate. Therefore, a violator of the rules (which are generally incorporated, at the very least by reference, into the lease), may be evicted. Because the owner of a condominium unit is a title holder in fee, no such remedy is available to the condominium association. *See infra* note 21.

<sup>12</sup> The section outlining the different standards which courts apply is of most beneficial use to the newly-formed or soon-to-be-formed condominium association.

<sup>13</sup> This is needed because oftentimes the cost of recovering the unpaid assessment or fine (including administrative and filing costs, as well as attorney's fees) will exceed the amount to be recovered. *See infra* Part III. It should be noted that the ability to recover costs is necessary to ensure the rights of the association (else they may be seen as attempting to "run up" the charges on a unit owner and, thus, coming in with unclean hands, *see infra* Part IV), and also to set an example to other unit owners that they will be forced to pay, if necessary.

<sup>14</sup> *See supra* note 10.

terest in the entity owning the building<sup>15</sup> and a lease entitling him to occupy a particular apartment within the building.<sup>16</sup> This structure of a cooperative lends itself to a much simpler resolution of difficulties, from the perspective of the governing association.

For example, while the condominium association may have various degrees of difficulty in dealing with the recalcitrant unit owner, for reasons as diverse as keeping up unsightly decorations,<sup>17</sup> causing an alleged nuisance,<sup>18</sup> or simply general non-conformity with the rules,<sup>19</sup> cooperative associations have been able to evict cooperators for reasons as minor as keeping a pet.<sup>20</sup> The nature of a cooperator's interest is that he typically owns stock in a corporation which owns the cooperative complex. He is then entitled to lease an apartment from the corporation. As such, many of the normal rules of the landlord-tenant relationship apply, including the ability of the landlord to evict the tenant.<sup>21</sup> Conversely, since the condominium unit owner is a title

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<sup>15</sup> This entity is typically a corporation. See generally 2A PATRICK J. ROHAN & MELVIN A. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE § 9.01-02 (1998) (explaining the organization of a cooperative corporation).

<sup>16</sup> See *supra* note 11.

<sup>17</sup> See *Stewart v. Kopp*, 454 S.E.2d 672, 673-74 (N.C. 1995) (holding condominium association was entitled to an injunction ordering a unit owner to remove unauthorized decorations).

<sup>18</sup> See, e.g., *Unit Owners' Ass'n of BuildAmerica-1 v. Gillman*, 292 S.E.2d 378, 382 (Va. 1982) (alleging that unit owner caused nuisance by storing garbage trucks in common area of condominium).

<sup>19</sup> See, e.g., *Dunlap v. Bavarian Village Condo. Ass'n*, 780 P.2d 1012, 1014 (Alaska 1989) (seeking judicial intervention against a unit owner who failed to comply with a parking regulation prohibiting the storage of a vehicle in the condominium parking area).

<sup>20</sup> See, e.g., *Hilltop Village Coop. #4, Inc. v. Goldstein*, 252 N.Y.S.2d 7 (Sup. Ct. App. Term. 1964) (granting an order of eviction unless a dog kept in contravention of a house rule against pets, for therapeutic purposes for the cooperator's mentally ill child, was disposed of within ninety days), *aff'd*, 258 N.Y.S.2d 348 (App. Div. 1965).

<sup>21</sup> The landlord will have the ability to evict the tenant for a breach of the lease. See, e.g., Ramsey, *Condominium: The New Look in Co-ops*, at 4 (HOME TIT. GUAR. CO. 1962) (explaining that the cooperator is "basically a tenant under a lease which is subject to forfeiture in the event of a default or breach of condition thereunder"); cf. John E. Cribbet, *Condominium—Home Ownership For Megalopolis?*, 61 MICH. L. REV. 1207, 1237 (1963) (comparing the condominium to the cooperative and discussing the benefit of being an owner of a condominium unit).

Courts, however, are not likely to simply evict a cooperator, even for somewhat substantial breaches of the proprietary lease. See 2A PATRICK J. ROHAN & MELVIN A. RESKIN, CONDOMINIUM LAW & PRACTICE § 11.02[2] (1998) ("For equitable reasons, the courts usually give the tenant the opportunity to cure the breach and grant to the landlord a judgment of eviction if the tenant fails to remedy the viola-

holder in fee of his unit, eviction per se is never an option.<sup>22</sup> Fortunately, there are other remedies available.<sup>23</sup>

## II. JUDICIAL REVIEW OF USE RESTRICTIONS

### A. Introduction

When we address the issue of dealing with the "recalcitrant" unit owner, we are making reference to one who is continually violating the house rules, or, in some cases, violating one house rule repeatedly. Any analysis of whether a house rule has been broken must then begin with a determination as to what is the appropriate scope of the particular house rule. Most courts will break the analysis into two parts. The first "prong" is a determination by the court as to whether the association is authorized to enact such a house rule at all, and/or whether the association has complied with the proper procedures in enacting such a rule.<sup>24</sup> Assuming the violation in question is of some properly authorized and enacted house rule, the court's analysis will then turn to the second prong—the substance of the rule itself. As to this second prong, the approaches taken by the various jurisdictions can be broken down into three main analyses or combinations thereof.<sup>25</sup> Some jurisdictions apply a true "reasonableness" standard.<sup>26</sup> Others prefer to use the "business judgment rule."<sup>27</sup>

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tion.").

<sup>22</sup> The results would be similar to attempting to get a neighbor evicted. See 2A ROHAN & RESKIN, *supra* note 21, § 11.05[1] ("[T]he cooperative [association] is said to be in a better position to defend itself [than a condominium association] because its constituents are merely lessees and hence run the risk of forfeiting their right of occupancy for recalcitrant behavior.").

<sup>23</sup> See *infra* Part III. It should be noted that because condominium and cooperative associations are very similar in the way they are managed, notwithstanding their differences in structure, many of the remedies described herein will translate for use in a cooperative structure. See, e.g., 2A ROHAN & RESKIN, *supra* note 21, § 11.02[2] ("Condominium house rules follow the basic outlines set forth in this section, but substitute a 'condominium association' and 'board of managers' in place of the cooperative association and its directors.").

<sup>24</sup> See, e.g., *Johnson v. Keith*, 331 N.E.2d 879, 882 (Mass. 1975) (invalidating a house rule because the particular rule required an amendment to the by-laws, which required a two-thirds vote, as opposed to an addition to the house rules, which required a simple majority).

<sup>25</sup> A fourth view, of sorts, may also exist, which puts hardly any limitations on an association's right to create restrictions. See, e.g., MD. CODE ANN., REAL PROP. § 11-104(c) (1992 & Supp. 1997) ("The bylaws also may contain any other provision regarding the management and operation of the condominium. . .").

<sup>26</sup> See, e.g., *Johnson v. Hobson*, 505 A.2d 1313, 1317 (D.C. 1986) (electing to ap-

The third analysis performed by some courts is that of a contractarian approach. Whereas the first two approaches provide a test for the courts, the contractarian view is not necessarily a test on its own, but rather a perspective that aids in determining whether a given restriction is reasonable. Many jurisdictions use a reasonableness test without considering the contractarian view, however, each approach needs to be addressed separately.

### *B. The First Prong*

Initially under consideration is the condominium association's ability to restrict the rights of unit owners. These restrictions might come in the form of preventing unit owners from putting up the style of door they wish, owning pets, or even collecting from the unit owner fines imposed for violating some house rule. The ability to restrict the rights of the unit owners also includes the association's ability to recover its costs of recovery, including attorney's fees. For a restriction to be valid at all, the condominium as an initial matter must have the authority to enact it.<sup>28</sup> While not all courts classify it as such, this is essentially the first prong of a two-pronged test.<sup>29</sup>

The authority to restrict the unit owner could come from the

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ply a "reasonableness" standard of review over the "business judgment rule").

<sup>27</sup> Some courts, in applying the business judgment rule, will consider an association's restrictions "reasonable" if they comply with the business judgment standard. See *infra* Part III.

<sup>28</sup> See *Miesch v. Ocean Dunes Homeowners' Ass'n*, 464 S.E.2d 64, 68 (N.C. Ct. App. 1995) (holding that a North Carolina Condominium Act provision adopted in 1986 did not apply to existing condominiums); see also *1A ROHAN & RESKIN*, *supra* note 21, § 45.04[1] (asserting that to be able to assess fees, penalties, etc., the association needs statutory authority and/or authority granted pursuant to the declaration of the condominium).

This statutory authority, of course, is still subject to judicial interpretation. See *Stewart v. Kopp*, 454 S.E.2d 672, 675 (N.C. 1995) (finding a statute authorizing fines of up to \$150 *per violation*, and assessment of a fine of \$100 *per day* valid, otherwise a unit owner could simply pay the \$150 fine and then ignore the association).

Unquestionably the only substantial reason that a provision need be able to withstand judicial scrutiny is if it eventually becomes necessary to resort to the courts to enforce the rules. An association could enact any type of provision it wishes, and so long as the unit owners comply (including by paying any fines or assessments pursuant to such rules), there will be no problem. But if the unit owner refuses to comply, it may be necessary to resort to the courts to obtain compliance.

<sup>29</sup> See, e.g., *Thanasoulis v. Winston Towers 200 Ass'n*, 542 A.2d 900, 903 (N.J. 1988) (using a two-pronged test to determine whether the action taken by the board was allowed: first, if it was authorized by statute or the by-laws and, second, that it was not fraudulent, self-dealing, or unconscionable).

by-laws of the association, the declaration of the condominium,<sup>30</sup> statute, or any combination of the above.<sup>31</sup> The most preferable situation is one in which the provision in question is authorized by all sources from its inception.<sup>32</sup> Even though the by-laws might authorize the association to amend the house rules as necessary, for example, this is not always considered enough "authorization" for the provision to withstand judicial scrutiny.<sup>33</sup>

### C. *The Second Prong*

Upon a determination that a unit owner has acted in contravention of a properly authorized and enacted house rule, the court will then turn to the second prong—the substance of the rule itself. The analytical theory that underlies a court's second prong analysis may vary from jurisdiction to jurisdiction, and may be classified into three categories or combinations thereof: a Reasonableness Test, the Business Judgment Rule, and the Contractarian View.

#### 1. The Reasonableness Test

Under the Reasonableness Test, the courts will enforce any restrictions which are deemed "reasonable." The question then becomes a matter of what the court will deem reasonable. Part

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<sup>30</sup> The declaration of condominium is similar to the articles of incorporation of a business.

<sup>31</sup> "Having the authority to enact" necessarily includes not being *restricted from* enacting the relevant provision as well.

<sup>32</sup> See, e.g., *Unit Owners' Ass'n of BuildAmerica-1 v. Gillman*, 292 S.E.2d 378, 385 (Va. 1982) ("A prospective purchaser of a unit is charged with notice of the contents of the master deed and of the bylaws and therefore has the option at the time of purchase to determine whether to sign an agreement and purchase a unit with such a restriction or limitation.").

<sup>33</sup> See, e.g., *Johnson v. Keith*, 331 N.E.2d 879, 881-82 (Mass. 1975) (holding that despite the by-laws' incorporation of the house rules, a restriction in the house rules against pets was invalid because the house rules could be amended by the board of managers and the by-laws could only be amended by a two-thirds vote of the unit owners). An action pertaining to the condominium property must be taken in accordance with the by-laws. See, e.g., N.Y. REAL PROP. LAW §339-u (McKinney 1989).

Cooperative provisions are subject to similar invalidation upon judicial review. See, e.g., *North Broadway Estates, Ltd. v. Schmoldt*, 559 N.Y.S.2d 457, 459 (Civ. Ct. 1990) (holding that the cooperative association exceeded its authority in attempting to change the type of penalty by "adopting a house rule rather than amending the proprietary lease").

These cases are no doubt attributable, at least in part, to judicial concern regarding proper notice to the unit owner. Along these lines, see 1 ROHAN & RESKIN, *supra* note 21, § 42.06[4] (suggesting that house rules should be distributed periodically).



of this determination will undoubtedly be dependant upon the remedy sought. For example, an association attempting to secure an injunction against the playing of loud music at an inappropriate hour is more likely to prevail than an association seeking thousands of dollars in unpaid fines and assessments, as well as attorney's fees, simply because the unit owner has put up a sign which does not comport with the association's taste. Although living in a condominium offers the advantages of owning property in fee for less than the cost of purchasing or maintaining a home, there is unfortunately a corresponding loss of unrestricted freedom which inevitably accompanies community living.<sup>34</sup> It is with this corresponding loss of freedom in mind that courts review use restrictions, assessments, penalties, and the like, to determine whether they are indeed reasonable. In doing so, some courts consider a provision reasonable if it is enacted for the good of the "health, happiness and enjoyment of life of various unit owners."<sup>35</sup> Other courts will decide whether the provision is reasonable in light of the contractarian nature of the agreement between the unit owner and the association.<sup>36</sup>

As with any reasonableness analysis, the judicial review of a use restriction is extremely subjective and fact-based. Thus, one jurisdiction may find a given restriction to be reasonable, while another may not.<sup>37</sup> Regardless, an overriding judicial concern in

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<sup>34</sup> See *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975). Discussing the drawbacks of condominium ownership, the court noted that:

[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

*Id.*

<sup>35</sup> *Id.* at 181; *accord*, *Ryan v. Baptiste*, 565 S.W.2d 196 (Mo. Ct. App. 1978) (holding that the installation of locks on doors that provide entry to common areas was a reasonable exercise of the board's authority). *But see* *Auerbach v. Bennett*, 393 N.E. 994, 1001 (N.Y. 1979) (finding that the business judgment rule was implemented to restrict judicial review of directors, unless there exists an allegation of bad faith); *Schoninger v. Yardarm Beach Homeowners' Ass'n*, 523 N.Y.S.2d 523, 529 (App. Div. 1987) (holding that the court should "limit its inquiry to whether the [board's] action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium").

<sup>36</sup> See *infra* notes 47-67 and accompanying text.

<sup>37</sup> See, e.g., *Coquina Club, Inc. v. Mantz*, 342 So. 2d 112, 113-14 (Fla. Dist. Ct. App. 1977) (upholding age restriction on potential unit holders implemented by the condominium association). *But see* *Camino Gardens Ass'n v. McKim*, 612 So. 2d 636, 638 (Fla. Dist. Ct. App. 1993) (holding restraints on alienation subject to acceptance

any reasonableness analysis is one of proper notice to the unit owner. If the restriction was in place before the unit owner purchased the condominium, the restriction is "clothed with a very strong presumption of validity."<sup>38</sup>

In addition, using such a subjective standard opens the door to the use of the courts' equity powers. For example, one of the defenses available to a unit owner is that of selective enforcement. If a restriction, which is otherwise reasonable, is only enforced against a unit owner that is not in good favor with the board, it is entirely possible that the court will find the restriction unreasonable. In either event, whether the restriction itself is unreasonable or the association's application of the rule is unreasonable, the result is be the same—the board will be powerless to enforce the provision against the unit owner.

## 2. The Business Judgment Rule

The Business Judgment Rule is an approach adopted by certain jurisdictions to determine whether the board's action was so unreasonable as to warrant judicial intervention.<sup>39</sup> This approach likens the association to a corporation, and the board of managers to a board of directors.<sup>40</sup> Under this theory, the provi-

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by the condominium association unreasonable).

<sup>38</sup> *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639-40 (Fla. Dist. Ct. App. 1981). The court further stated:

[This presumption] arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right. . . . Indeed, a use restriction in [the originating documents] may have a certain degree of unreasonableness to it, and yet withstand attack in the courts.

*Id.* at 639-40; *see also* *Constellation Condominium Ass'n v. Harrington*, 467 So. 2d 378, 381 (Fla. Dist. Ct. App. 1985) (stating that language that is unambiguous and agreed to by the parties will be upheld); *Noble v. Murphy*, 612 N.E.2d 266, 269 (Mass. App. Ct. 1993) (awarding the condominium association \$15,000 and granting an injunction that required the unit owner to remove her dogs because the unit owner purchased her unit even though she was on notice of the restriction, despite the fact that the case was moot because the unit owner and her dogs died together in an accident).

<sup>39</sup> *See* 6A PATRICK J. ROHAN, *HOMEOWNER ASSOCIATIONS AND PUDS* § 7A.06, at 7A-120 (1998) (stating that courts are willing to apply the business judgment rule to the condominium association); *Schoninger*, 523 N.Y.S.2d at 528 (stating that the business judgment rule restrains courts from deciding whether a director acted properly).

<sup>40</sup> *See* 1A ROHAN & RESKIN, *supra* note 21, § 44.07[4].

sion in question is valid so long as the board has acted in good faith and in furtherance of the legitimate interests of the condominium.<sup>41</sup> This approach also operates generally to protect the association from liability for its acts, absent a showing of "lack of good faith, fraud, self-dealing or unconscionable conduct."<sup>42</sup> Typically, the burden of proof is on the moving party. Thus, in an action to enforce its restrictions, or recover fines, the board may be forced to show that it has acted in good faith and in furtherance of the legitimate interests of the condominium.<sup>43</sup> In other words, some jurisdictions require a showing by the board that its actions were not arbitrary or capricious.<sup>44</sup>

It should be noted that as with any standard business judgment rule application, the board will not be protected upon a showing of bad faith, or if the board knowingly participates in or condones wrongful or negligent conduct.<sup>45</sup> Thus, to ensure that its decisions will be upheld and to shield itself from liability, the board should keep a record of its actions and reasons therefor. Such reasons may include suggestions from an independent, outside party whose advice the board has sought. The business judgment approach has been viewed by some as giving too much leeway to the association, and has come under criticism from

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As a side note, because of the structure of a cooperative—i.e. each cooperator owns stock in a corporation that leases a unit to the cooperator—the business judgment rule is more readily applied to cases involving cooperatives than to cases involving condominiums.

<sup>41</sup> See *Agassiz W. Condominium Ass'n v. Solum*, 527 N.W.2d 244 (N.D. 1995) (stating that a court's inquiry into the decisions of board members is limited); *Schoninger*, 523 N.Y.S.2d at 529 (reasoning that it is up to the court to decide whether the board acted in good faith to the benefit of the condominium and whether its actions were authorized—the business judgment rule precludes any other analysis).

<sup>42</sup> *Dockside Ass'n v. Detyens*, 362 S.E.2d 874 (S.C. 1987) (holding that the business judgment rule applies to condominium associations).

<sup>43</sup> See 6A ROHAN, *supra* note 39, at 120-21. ("Officers and directors of the association have a fiduciary responsibility to exercise ordinary care in performing their duties and are required to act reasonably and in good faith.") *Id.*

<sup>44</sup> See *Goddard v. Fairways Dev. Gen. Partnership*, 426 S.E.2d 828 (S.C. Ct. App. 1993) (holding that while the business judgment rule will protect the board from attack, it does not prevent dismissal of a board's petition to terminate a unit owner's month-to-month tenancy, absent a showing by the board of *any* reason for terminating the tenancy).

<sup>45</sup> See 6A ROHAN, *supra* note 38, at 7A-122 (stating that board members must act within their authority); see also *Raven's Cove Townhomes, Inc. v. Knappe Dev., Co.*, 171 Cal. Rptr. 334 (Ct. App. 1981) (discussing the fiduciary duty owed to a community association by directors—directors may not act in their own interests at the expense of the association).

many commentators.<sup>46</sup>

### 3. The Contractarian View

The Contractarian View proposes that individuals, so long as they are competent, are free to contract (or not to contract) for whatever they wish. The by-laws, and to an extent the house rules, are viewed as a contract between the unit owner and the association, and as such are governed by general contract principles.<sup>47</sup> Many courts will use this approach in conducting a reasonableness analysis. Essentially, this means that most restrictions created by the association and agreed to by the unit owner will be upheld.

This view often becomes most controversial when a court applies it to an attorney fee-shifting clause.<sup>48</sup> While the contrac-

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<sup>46</sup> See N.Y. REAL PROP. LAW § 339-w (McKinney 1989):

The manager or board of managers, as the case may be, shall keep detailed, accurate records, in chronological order, of the receipts and expenditures arising from the operation of the property. Such records and the vouchers authorizing the payments shall be available for examination by the unit owners at convenient hours of weekdays. A written report summarizing such receipts and expenditures shall be rendered by the board of managers to all unit owners at least once annually.

*Id.*; WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 6.02 (a)(1), at 212-218 (2d ed. 1988). Hyatt denotes four general principles that form the business judgment rule. Board members must act with reasonable care when fulfilling their responsibilities and, in so doing, they must seek the requisite information to make responsible decisions. They are responsible for and must oversee those to which they delegate duties, and only delegate those duties which may be done by others. Finally, a general premise to which board members should adhere to ensure that they fall within the protection of the business judgment rule is to act with "good faith, diligence, care, and skill." *Id.* at 213; Jeffrey A. Goldberg, Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT L. REV. 653 (1988); Jeffrey A. Goldberg, Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 653, 664-67 (1988); see also Noble v. Murphy, 612 N.E.2d 266, 271 n.7 (Mass. App. Ct. 1993) (rejecting the business judgment rule, which has received "varying degrees of approval among commentators").

<sup>47</sup> See *Papalexio v. Tower W. Condominium*, 401 A.2d 280 (N.J. Super. Ct. Ch. Div. 1979). The court did not grant attorney's fees because the by-laws required attorney's fees only when the board took legal action for non-compliance with the by-laws and not when the board itself was the defendant. See *id.* at 288. See generally *Cohen v. Fair Lawn Dairies, Inc.*, 206 A.2d 585, 589 (N.J. Super. Ct. App. Div. 1965) (holding that an arm's length transaction in which the parties agree to pay the other side's attorney's fees if the contract is breached is not void as against public policy), *aff'd*, 210 A.2d 73 (N.J. 1965).

<sup>48</sup> See *Nottingdale Homeowners' Ass'n v. Darby*, 514 N.E.2d 702, 706 (Ohio 1987). The court reasoned that a fee shifting clause, when entered into freely by the contracting parties, must be held valid for policy reasons, stating that the defen-

tarian view has been criticized for giving, in many cases, too much power to the condominium association,<sup>49</sup> this approach in its early days actually created significant problems for the associations.<sup>50</sup> As with any contract, the requirement that a defaulting party pay some pre-set amount of dollars to another party will be upheld so long as the amount is considered to be a reasonable expectation of the other party's damages.<sup>51</sup> Courts, however, generally do not like to impose a *penalty* upon one party for

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dants must be held responsible for the association's attorney's fees because a refusal to enforce the fee-shifting provision would effectively bring an end to such associations. *See id.*; see also *Blount v. Smith*, 231 N.E.2d 301, 305 (Ohio 1967) (holding that the right to contract freely is as fundamental as the right to write and speak without restraint, and observing that contracts entered into freely must be upheld); *Cohen*, 206 A.2d at 589 (stating that if agreed to in an arm's length transaction, a fee-shifting clause will be held valid). *But see Darby*, 514 N.E.2d at 708 (Locher, J., dissenting) (arguing that absent a statutory provision allowing recoupment of attorney's fees, contractual provisions requiring recovery of such fees are invalid because the parties do not have equal bargaining power).

<sup>49</sup> See Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 STETSON L. REV. 1133, 1149 (1993). Schiller asserts that if the contractarian view were applied across the board, unit owners who challenge restrictions would invariably lose:

Although the contract theory has considerable justification when used to uphold existing restrictions contained in the declaration and bylaws at the time the unit owner purchased his condominium unit, it loses force when applied to rules and amendments to the declaration and bylaws promulgated after the purchase has occurred. As to these subsequently enacted limitations, there is very little logic in saying a unit owner has consented in advance to being bound by them, even if they are unfair or discriminatory as applied to the particular unit owner.

*Id.* *But see id.* at 1163 (arguing that the reasonableness standard creates unpredictable results). The article endorses alternative methods of dispute resolution, such as internal mechanisms in the condominium documents. *See id.* For an example of a statute that provides for dispute mechanisms designed to resolve disputes between unit owners and the association, see FLA. STAT. ANN. § 718.1255 (West 1991).

<sup>50</sup> See *Rajski v. Tezich*, 514 N.E.2d 347, 349 (Ind. Ct. App. 1987) (finding a fine of ten dollars per day for violations of covenants to be an unenforceable penalty); *Unit Owners Ass'n of BuildAmerica-1 v. Gillman*, 292 S.E.2d 378 (Va. 1982) (holding that since the imposition of fines is a governmental power, an association could not penalize without authority). *But see Ritchey v. Villa Nueva Condominium Ass'n*, 146 Cal. Rptr. 695, 697 (Ct. App. 1978) (upholding a condominium restriction allowing only persons eighteen years of age and older occupancy in a unit).

<sup>51</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979) (stating that anticipated damages must be reasonable to be upheld). For a recent discussion of liquidated damages, see *Perfect Solutions, Inc. v. Jerrod, Inc.*, 974 F. Supp. 77, 84 (D. Mass. 1997) (precluding summary judgment on the issue of whether liquidated damages took the form of a penalty). The court left the issue of liquidated damages for the trier of fact to determine whether the amount reflected a reasonable ascertainment of damages. *See id.* The court concluded by stating that if the liquidated damages section had a built-in penalty, it would be invalid. *See id.*

default.<sup>52</sup> To the extent the fine assessed by the condominium association was viewed as a penalty, as opposed to a recoupment of the "damages" of the association, courts taking the contractarian approach would invalidate the assessment.<sup>53</sup> In addition, as applied to condominiums, courts do not like the idea of giving the association the power to force the unit owner into submission through penalties, particularly where the failure to pay fines and assessments will create a lien on the unit, with the possibility of foreclosure in the future.<sup>54</sup>

Some courts are willing to embrace this view, and even take it to its extreme. For example, in *Unit Owners' Ass'n of BuildAmerica-1 v. Gillman*,<sup>55</sup> the defendant rented a commercial condominium from the plaintiff, out of which the defendant ran a garbage-hauling business and stored trucks.<sup>56</sup> After over a year in the unit, and the purchase of another unit to expand their business without a complaint, the board enacted a house rule providing a maximum weight for trucks stored on the property, aimed specifically at the Gillmans,<sup>57</sup> and assessed a fine of \$25 per day, per infraction.<sup>58</sup> This amounted to \$125 per day for the Gillmans and their five trucks.<sup>59</sup> When the fine reached \$8000, the board decided to double it.<sup>60</sup> The association brought suit to recover the fines assessed when they reached over \$20,000.<sup>61</sup> The court noted that from the testimony of the board members, it was clear they were trying to punish the Gillmans, not assess them.<sup>62</sup> In particular, one board member said that fining better suited the purpose of the board, because the only way to get the

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<sup>52</sup> See, e.g., *H.J. McGrath Co. v. Wisner*, 55 A.2d 793, 795-96 (Md. 1947) (holding a fixed liquidated damages clause to be a penalty and thus unenforceable).

<sup>53</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."). See generally *North Broadway Estates, Ltd. v. Schmoldt*, 559 N.Y.S.2d 457, 459 (N.Y. City Ct. 1990) (stating that the authority of the board to exact fees is limited to the parameters of the lease); *Schoninger v. Yardarm Beach Homeowners' Ass'n*, 523 N.Y.S.2d 523, 530 (App. Div. 1987) (upholding fee shifting because it is authorized in the by-laws).

<sup>54</sup> See N.Y. REAL PROP. LAW § 339-aa (McKinney 1989 & Supp. 1998) (providing the remedy of foreclosure to recover an outstanding lien against a unit owner).

<sup>55</sup> 292 S.E.2d 378 (Va. 1982).

<sup>56</sup> See *id.* at 380.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

Gillmans out was to "ruin them."<sup>63</sup> Even here, where the court was wary of the greater than \$20,000 fine assessed against the Gillmans, it remanded the case for a determination as to whether the relevant provision was "reasonable," keeping in mind that the Gillmans were put on notice at the time of signing that the rules were subject to change.<sup>64</sup> Ultimately, the court found the imposition of fines to be an unconstitutional penalty which could be imposed only by a governmental body.<sup>65</sup>

Not all courts, however, are as willing to enforce the association's rules as was the lower court in *BuildAmerica*.<sup>66</sup> Essentially, because the unit owner has agreed to abide by the rules (and to the board's authority to amend the rules), he is estopped from claiming that the rules should not be enforced against him. The court, however, may be unwilling to use its equity power of estoppel where the board is attempting to perpetuate its own wrongdoing.<sup>67</sup>

### III. THE SOLUTIONS

The common remedies available to a condominium association are: suspension of voting rights, suspension of privileges or services and monetary sanctions or fines.<sup>68</sup> In the event of a continued failure to comply, the association may also be entitled to an injunction<sup>69</sup> and/or a lien against the property,<sup>70</sup> which

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<sup>63</sup> *Id.* at 384.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 383-84.

<sup>66</sup> Neither was the Virginia legislature, which amended its laws governing condominiums after the *BuildAmerica* decision. *See* 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3]; *see also* VA. CODE ANN. § 55-79.53 (1998) (allowing assessments against unit owners by associations, but omitting use of the words "penalty" or "fines").

<sup>67</sup> *See* Barnett & Klein Corp. v. President of Palm Beach (A Condominium), 426 So. 2d 1074 (Fla. Dist. Ct. App. 1983) (finding that the unit owner was not equitably estopped from bringing a claim because he had signed a letter agreeing to obey all of the house rules; the court refused to use an equitable remedy to allow the association to profit from and perpetuate its own wrongdoing).

<sup>68</sup> *See* 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3][6][1].

<sup>69</sup> *See* N.Y. REAL PROP. LAW § 339-j (McKinney 1989):

Failure to comply with [the by-laws and rules] shall be ground for an action to recover sums due, for damages or injunctive relief or both. . . . In any case of flagrant or repeated violation by a unit owner, he may be required by the board of managers to give sufficient surety or sureties for his future compliance with the by-laws, rules, regulations, resolutions and decisions.

*Id.*; *see also* 735 ILL. COMP. STAT. 519-102 (West 1993); The 400 Condominium Ass'n v. Tully, 398 N.E.2d 951, 954 (Ill. App. Ct. 1979).

could end in foreclosure.<sup>71</sup> Additionally, the association may be entitled to an action for breach of covenant to pay<sup>72</sup> and certain self-help remedies, such as the towing of cars or the hiring of a third party to maintain a unit owner's area. While there are a wide variety of remedies available to the condominium association, the effectiveness of these remedies is equally varied. An examination of several of these remedies will allow the association to determine which remedy will best suit its needs. The association should keep in mind that these remedies are available only to the extent authorized (or not prohibited) by the governing statutes, the declaration of condominium, and the by-laws, and only so long as they pass the appropriate "test."<sup>73</sup>

### A. Suspension of Voting Rights

So long as it is provided for in the by-laws, the right to vote at association meetings may be suspended. However, this form

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<sup>70</sup> See, e.g., N.Y. REAL PROP. LAW § 339-z (McKinney 1989 & Supp. 1998) ("The board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon. . . ."); N.Y. REAL PROP. LAW § 339-aa (McKinney 1989 & Supp. 1998) ("The lien provided for in the immediately preceding section shall be effective from and after the filing. . . and shall continue in effect until all sums secured thereby, with the interest thereon, shall have been fully paid or until expiration six years from the date of filing. . . ."); see also *Streams Sports Club, Ltd. v. Richmond*, 440 N.E.2d 1264, 1266 (Ill. App. Ct. 1982) (upholding a by-law that provided a successor to the original developer's interest the right to enforce a "lien against the interest of the unit owned by the owner.").

<sup>71</sup> See, e.g., N.Y. REAL PROP. LAW § 339-aa (McKinney 1989 & Supp. 1998), which provides in pertinent part:

Such lien may be foreclosed by suit authorized by and brought in the name of the board of managers. . . . In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit for any period prior to sale . . . if so provided in the by-laws. . . . The board of managers, acting on behalf of the unit owners, shall have power, unless prohibited by the by-laws, to bid in the unit at foreclosure sale. . . . Suit to recover a money judgment for unpaid common charges shall be maintainable without foreclosing or waiving the lien securing the same, and foreclosure shall be maintainable notwithstanding the pendency of suit to recover a money judgment.

*Id.* This language also demonstrates the importance of authorizing board action through the by-laws.

<sup>72</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 45.10[2][a] ("In general, an association may obtain a money judgment against a unit owner for unpaid maintenance assessments more quickly than it can obtain title to a condominium unit in a lien foreclosure proceeding.").

<sup>73</sup> See *supra* Part II.



of remedy may be less effective than the others.<sup>74</sup> In addition to possibly requiring a due process hearing,<sup>75</sup> a potentially costly and time-consuming remedy, it may not create the desired effect. Many unit owners who do not follow the rules of a condominium may not care about its operation or even attend association meetings.<sup>76</sup> In effect, this means that the unit owner may feel that he has lost little, if anything at all. Ultimately, this remedy is one of the least effective means of encouraging compliance and is possibly more trouble than it is worth.

### *B. Suspension of Privileges or Services*

From the association's point of view, suspension of a unit owner's privileges or services may be a very effective means of exacting compliance, so long as it is provided for in the governing documents and/or by statute.<sup>77</sup> One reason individuals might decide to join a condominium association is for the extra benefits provided at a fraction of the cost of having those same benefits individually. For example, it is more cost-effective to have a common swimming pool, maintained by only a couple of people for the benefit of all, or to have a maid or laundry service provided at a "group" discount rate, than it would be to have these amenities in a private home. Suspending an individual's right to use the pool during the summer, for example, may prove very effective.

At the same time, courts frown upon the unit owner who resorts to self-help remedies such as withholding common charges.<sup>78</sup> At least one court has noted a legislative trend to-

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<sup>74</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3][b][ii] (noting that "those who do not comply with the rules of an association do not participate in it either . . . revocation of voting rights is an ineffective means of encouraging compliance").

<sup>75</sup> We are dealing generally with property rights. Therefore due process is invoked even though the association is typically not considered a government agency. For some courts, the hearing based on a suit brought either by the association or the unit owner to enforce particular rights is enough. For others, however, this is inadequate. See generally Schiller, *supra* note 49, at 1147; Brian L. Weakland, *Condominium Associations: Living Under the Due Process Shadow*, 13 PEPP. L. REV. 297 (1986).

<sup>76</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3][b][iii].

<sup>77</sup> See *id.*

<sup>78</sup> See, e.g., *Blood v. Edgars*, 632 N.E.2d 419, 421 (Mass. App. Ct. 1994). *Blood* held that "absent a prior judicial determination of illegality, a unit owner must pay its share of the assessed common expenses. Self-help remedies, such as withholding condominium common expense assessments, are not available." *Id.* The court also noted that "a unit owner is not without remedy or recourse to challenge the propri-

wards strengthening the rights of the condominium association to enforce its rules and restrictions.<sup>79</sup> The combination of preventing unit owners from taking matters into their own hands and the legislative trend makes this remedy one of the more effective ones. It is effective not only because the unit owner may care more about these services than one's voting rights or the imposition of fines, but also because it is one of the more likely remedies to be upheld. If a unit owner is unwilling to abide by the rules of the community, it makes sense that a prohibition be imposed restricting participation in the services offered to the community until compliance with the rules is achieved. As always, it is imperative that the association provide for this remedy in its governing documents to prevent a successful defense of "lack of authority."

### C. Monetary Sanctions or Fines

The laws regarding the assessment and collection of fines in the context of a recalcitrant unit owner vary widely from state to state.<sup>80</sup> Courts differ as to the degree of fines considered reasonable<sup>81</sup> and on the extent of due process required.<sup>82</sup> Some juris-

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ety of common expense assessments. We suggest that aggrieved unit owners should timely pay—under protest—the common expense assessment. Thereafter, a judicial determination of the legality of the assessment, and suitable reimbursement, may be sought." *Id.* at 421-22; see also *Baker v. Monga*, 590 N.E.2d 1162, 1164 (Mass. App. Ct. 1992) ("Absent an adjudication...that the condominium association's adoption of its budget or imposition of its assessment was accomplished in bad faith or in excess of its authority, condominium charges by the unit owners' organization are not subject to set-off or some other form of self-help remedy."); *Mountain View Condominium Ass'n v. Rumford Ass'n*, No. CV 94556935, 1997 Conn. Super. LEXIS 591, at \*4-\*5 (Conn. Super. Ct. Mar. 4, 1997) (noting that an owner cannot "properly withhold payment of lawfully assessed common charges").

<sup>79</sup> In *Blood*, the court commented:

[T]he Legislature has consistently amended the act to strengthen common expense collection. For example, under an amendment effective as of March 1, 1992, unit owners are personally liable for common expense assessments and these may be collected and applied against the unit owner's debt, as within statutory limitations, from any tenant renting the unit. In addition, if a receiver is appointed, a lien for charges for expenses incurred by the receiver is given "priority over all other liens, and mortgages except municipal liens."

See *Blood*, 632 N.E.2d at 421 n.2 (citations omitted).

<sup>80</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3][6][iv], at 44-58.

<sup>81</sup> See *supra* Part II.

<sup>82</sup> Cf. 1A ROHAN & RESKIN, *supra* note 21, § 43.05[2][c]. ("The Uniform Condominium Act and the Uniform Common Interest Ownership Act provide that the levy of a fine requires both prior notice and opportunity to be heard.").

dictions have taken the view that fines are impermissible "penalties,"<sup>83</sup> while other jurisdictions permit a lien on unpaid common charges and assessments, but not for fines, attorney's fees and other expenses incurred during recovery.<sup>84</sup>

To help sort out this jurisprudence, the case of *BuildAmerica* is again demonstrative.<sup>85</sup> The Virginia Supreme Court held the fine imposed to be an unconstitutional penalty and drew a distinction between "assessments" and "fines."<sup>86</sup> Referencing Black's Law dictionary, the court noted that an "assessment" is the unit owner's portion of the expenses for the maintenance of the common areas, whereas a "fine" is a penalty.<sup>87</sup> Further, a fine "disguised as an assessment"<sup>88</sup> could not be imposed.<sup>89</sup> Taking the contractarian view, it concluded that penalties were not allowed.<sup>90</sup> "[T]he imposition of a fine is a governmental power. The sovereign cannot be preempted of this power, and the power cannot be delegated or exercised other than in accordance with the provisions of the Constitutions of the United States and of Virginia."<sup>91</sup>

The line between an unenforceable penalty and a permissible recoupment of loss is, of course, subjective and dependent upon the facts of the case. The Restatement (Second) of Contracts offers two factors to determine whether the fixed damages are "so unreasonably large as to be a penalty."<sup>92</sup> The first factor

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<sup>83</sup> See *Unit Owners' Ass'n of BuildAmerica-1 v. Gillman*, 292 S.E.2d 378, 383 (Va. 1982). In response to this opinion, the Virginia legislature enacted a statute authorizing "fines." See 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3][b]; see also *Spratt v. Henderson Mill Condominium Ass'n*, 481 S.E.2d 879, 881 (Ga. Ct. App. 1997) (noting that an assessment is "neither a liquidated damages award nor an unenforceable penalty [but] a fine specifically allowed by statute").

<sup>84</sup> See *Board of Managers of 140 East 56<sup>th</sup> St. Condominium v. Hausner*, 666 N.Y.S.2d 619, 619 (App. Div. 1997) (holding that the court properly granted attorney's fees, but determining that the fees granted were unreasonable compared to the outstanding common charges); *In re Mishkin*, 85 B.R. 18 (Bankr. S.D.N.Y. 1988) (holding that a lien could not be granted for attorney's fees because the declaration of condominium expressly forbade such a lien). But see *Colonial Court Homeowners' Ass'n v. Cole*, No. CV 960560458, 1997 Conn. Super. LEXIS 3489, at \*4 (Conn. Super. Ct. Dec. 29, 1997) (holding that attorney's fees may be collected).

<sup>85</sup> For a summary of the facts of *BuildAmerica*, 292 S.E.2d 378 (Va. 1982), see *supra* notes 55-65 and accompanying text.

<sup>86</sup> *BuildAmerica*, 292 S.E.2d at 384.

<sup>87</sup> *Id.* (citing BLACK'S LAW DICTIONARY 569 (5th ed. 1979)).

<sup>88</sup> *Id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> *Id.*

<sup>92</sup> RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981).

is "the anticipated or actual loss caused by the breach."<sup>93</sup> The second factor is "the difficulty of proof of loss."<sup>94</sup> As the difficulty in proving that a loss has occurred or the amount of the loss increases, so does the likelihood that the amount fixed is reasonable.<sup>95</sup> Any "assessment" deemed to be a penalty will be unenforceable as against public policy.<sup>96</sup>

Toward this end, it is suggested that the association compile a record of its reasoning behind setting the assessment at a particular level, perhaps by putting such reasoning in the house rules distributed to unit owners, or in the by-laws of the association, or perhaps in the minutes of the meeting adopting the relevant house rule or use restriction. The justifications for setting an assessment at a certain level could be to recoup the costs of monitoring compliance and subsequent enforcement, as well as the expected costs to the association for recovery, including its attorney's fee schedule.

#### D. *The Recovery of Assessments*

Usually, statutes and the condominium association documents provide for a lien on the unit for unpaid assessments,<sup>97</sup> and give the association standing to sue.<sup>98</sup> Such a lien may be foreclosed in the same manner as a mortgage on real property.<sup>99</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981). The Restatement reads in pertinent part:

Liquidated Damages and Penalties

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

*See id.* cmt. a ("The central objective behind the system of contract remedies is compensatory, not punitive.").

<sup>97</sup> *See* Unif. Common Interest Ownership Act § 3-116, 7 U.L.A. 600 (1994) (providing a lien right for collection of fines unless the declaration provides otherwise).

<sup>98</sup> *See, e.g.,* CAL. CIV. PROC. CODE § 383 (Deering 1992 & Supp. 1997) (allowing "[a]n association established to manage a common interest development" to have standing to sue without having to join the individual owners). If the association does not have standing to sue, the unit owners may have to attain class action status to sue. *See* 1A ROHAN & RESKIN, *supra* note 21, § 42.10[1].

<sup>99</sup> *See, e.g.,* N.Y. REAL PROP. LAW § 339-aa (McKinney 1989 & Supp. 1998) ("Such lien may be foreclosed by suit authorized by and brought in the name of the board of managers . . . in like manner as a mortgage of real property. . . ."); *see also*

However, some states do require that the lien be recorded in order to be valid.<sup>100</sup> For other states, recordation of the declaration of condominium authorizing the lien is notice enough.<sup>101</sup> In many cases, any such lien allowed will be subordinate to a first mortgage, so the association should be wary of foreclosing until a comparison is made between the charges due and the amount outstanding on the first mortgage (if any).<sup>102</sup> Also, even where such a lien is given priority over a first mortgage, the lien is typically still subject to any monies the unit owner may owe to the municipality, city, or state.<sup>103</sup>

### *E. Recovery of Attorney's Fees*

As discussed above, it is often necessary for the association to attempt recovery of what might seem like trivial fines.<sup>104</sup> Such action is required of the association due to both the cumulative effect of allowing seemingly trivial fines to "slide," and to ensure that the association does not open itself up to liability. Such li-

Unif. Common Interest Ownership Act (UCIOA) and Unif. Condominium Act (UCA) § 3-115(c); FLA. STAT. ANN. §§ 718.113(1) and 718.116(6)(a) (1988); cf. 1A ROHAN & RESKIN, *supra* note 21, §§ 43.03[4] and 45.09 [1] n.1 (listing the relevant statutes for 38 states and the District of Columbia).

<sup>100</sup> See, e.g., *In re Eatman*, 182 B.R. 386 (Bankr. S.D.N.Y. 1995) (finding that NY grants a condominium association a lien, but a notice of lien must be filed to be valid); *In re Raymond*, 129 B.R. 354 (Bankr. S.D.N.Y. 1991) (allowing a lien for unpaid common charges if recorded); see also 1A ROHAN & RESKIN, *supra* note 21, § 45.09 n.3 (listing 15 states and their relevant statutes).

<sup>101</sup> See *id.*

<sup>102</sup> See, e.g., N.Y. REAL PROP. LAW § 339-z (McKinney 1989 & Supp. 1998), which provides in pertinent part:

The board of managers . . . shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all other liens except only (i) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit, and (ii) all sums unpaid on a first mortgage of record, and (iii) all sums unpaid or on a subordinate mortgage of record held by the New York job development authority.

*Id.* This does not mean, however, that the association could not foreclose on its liens, obtain title and rent out the property, and pay the remaining amounts due on the first mortgage itself. See 1A ROHAN & RESKIN, *supra* note 21, § 45.10[2]; see also *Bankers Trust Co. v. Board of Managers of the Park 900 Condominium*, 616 N.E.2d 848 (N.Y. 1993) (maintaining priority of a first mortgage lien over a lien for unpaid common charges). But see *supra* note 69 and accompanying text.

<sup>103</sup> See, e.g., N.Y. REAL PROP. LAW § 339-z (McKinney 1989 & Supp. 1998). It is not unusual for an individual who is anticipating filing for bankruptcy to stop paying everyone altogether. The association should keep in mind that it may not be the only party trying to recover from the unit owner.

<sup>104</sup> See *supra* Parts I-III and accompanying notes.

ability includes actions by compliant unit owners for not enforcing the house rules against recalcitrant unit owners, and claims of selective enforcement by the unit owners subject to the association's enforcement powers. Liability also includes claims by recalcitrant unit owners that an association's failure to act was in bad faith, designed to allow the fines to accrue. However, in many instances the cost of recovery is far greater than the fines themselves. Ensuring an association's longevity depends greatly on its ability to recoup a portion of these costs, including attorney's fees related to fine collection.<sup>105</sup> In addition, while the threat of a \$100 fine may be considered trivial by a unit owner, the thought of having to pay the association's costs in exacting compliance may cause the condominium owner to pay what is owed.<sup>106</sup>

As with any other action the association might take, it will only have the ability to recover attorney's fees if such recovery is provided for and not prohibited by the relevant condominium documents and statutes. Particularly, when deciding whether to award one party attorney's fees, the court is more likely to take a contractarian view, treating the by-laws and any other documents as an agreement between the unit owner and the association.<sup>107</sup> In such a case, standard contract rules seem to apply. Therefore, each party typically must bear his own costs unless the parties have agreed otherwise by contract,<sup>108</sup> or unless the conduct of one party is so egregious as to warrant an award.<sup>109</sup>

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<sup>105</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 43.02[3]:

[I]f the documents fail to allow the association to recover reasonable attorneys' fees incurred in judicial enforcement (where such recovery is not provided by statute), it could be difficult for the association to enforce the rules, regulations, and restrictions contained in the condominium documents.

*Id.*; see *Nottingdale Homeowners' Ass'n, Inc. v. Darby*, 514 N.E.2d 702, 706 (Ohio 1987) (noting that if a court did not award reasonable attorney's fees, the expense of collection would render the effort useless).

<sup>106</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 43.02[3] ("Legal action against a recalcitrant owner can be costly and the association's ability to receive an award for attorneys' fees is often a helpful element in obtaining compliance.")

<sup>107</sup> See *supra* Part II.C.3.

<sup>108</sup> See 20 AM. JUR. 2D *Costs* § 72 (1965).

<sup>109</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3]. *But compare* 181 E. 73d St. Co. v. 181 E. 73d St. Tenants Corp., 954 F.2d 45 (2d Cir. 1992) (holding that a party may recover attorney's fees under the Abuse Relief Act only if the suit is lacking in substantial merit) *with* 305 E. 24th Owners Corp. v. Parman Co., 994 F.2d 94 (2d Cir. 1993) (holding that plaintiff need not show that defendant's opposition was frivolous to recover reasonable attorney's fees).

In addition, some jurisdictions specifically provide for the recovery of attorney's fees by statute, while other courts have held that the ability to recover reasonable attorney's fees need not be statutorily provided.<sup>110</sup>

Although there undoubtedly does exist some outer limit as to the amount of recoverable costs, including attorney's fees and costs associated with the administration and monitoring of compliance, such a limit is ill-defined. In some cases the association might be limited to what is "reasonable," in others, this limit might be what one could term as "reasonable plus."<sup>111</sup> It is fair to say that there should be some relation between the amount to be recovered and the costs involved in recovering it, although exactly what this relationship is remains unclear.<sup>112</sup> Suffice it to say, the limit probably falls somewhere between the

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<sup>110</sup> See *In re Hampton*, 142 B.R. 51 (Bankr. Conn. 1992) (requiring that debtor-unit owner's chapter 13 bankruptcy plan include pre-petition costs and attorney's fees to the association); see also The Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. § 3611(d) (1988); CAL. CIV. CODE § 1354(f) (Deering 1994 & Supp. 1996) (awarding the prevailing party reasonable attorney's fees); FLA. STAT. ANN. § 718.303(1) (West 1988 & Supp. 1997) (indicating the prevailing party can recover reasonable attorney's fees).

<sup>111</sup> See *supra* Part II.C.1 and accompanying notes (asserting that sometimes a court will enforce even an unreasonable provision so long as provided for in the condominium association documents, and the unit owner had at least constructive knowledge of the provision); see also Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 843 (1995) (stating that some jurisdictions apply the business judgment rule and refuse to engage in an analysis of the reasonableness of provisions contained in condominium association documents).

<sup>112</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 45.04[1]. Dean Rohan's treatise suggests that, so as to be able to recover all costs of collection, an association not limit itself in its condominium documents to a percentage of the unpaid assessments or other amounts due to the association:

Even if the association has the right to recover a high percentage of a relatively small amount due, the association will not cover its legal fees. . . . It may even be appropriate to specifically have authorized not only the recovery of reasonable legal fees but the specific hourly rates or other fee arrangement so there is little doubt that the unit owner is responsible for all the legal fees of the association.

*Id.*; see also *Wehant v. Wren's Cross of Atlanta Condominium Ass'n*, 332 S.E.2d 368 (Ga. Ct. App. 1985) (noting that if the governing documents permitting reasonable attorney's fees do not specify a certain percentage, the attorney's fees may be many times in excess of assessment).

Any disparity between the amount of recovery and the costs to be awarded, however, does not preclude the award of attorney's fees. See *Sokolof v. Eden Point N. Condominium Ass'n*, 487 So. 2d 1114 (Fla. Dist. Ct. App. 1986) (holding that the court is required to award attorney's fees within the parameters of expert evidence).

fees awarded in *Wehunt v. Wren's Cross of Atlanta*<sup>113</sup> and *Ziontz v. Ocean Trail Unit Owners Ass'n*.<sup>114</sup> While *Wehunt* awarded \$9000 in attorney's fees for the collection of \$906 in common expenses and late charges,<sup>115</sup> *Ziontz*, which was reversed on appeal,<sup>116</sup> awarded \$60,000 in a foreclosure of a \$100 common assessment.<sup>117</sup> Practically speaking, the inclusion of a provision allowing the recovery of costs and attorney's fees in the condominium documents is of utmost importance to augmenting its significance and its potential for enforceability.

#### IV. DEFENSES OF THE UNIT OWNER

Predictably, the unit owner likely will not sit idly by and allow the association to levy a fine or foreclose on his home.<sup>118</sup> Typically, his defenses to these actions will come in the form of a claim alleging lack of authority,<sup>119</sup> waiver,<sup>120</sup> or selective enforcement.

The defense of lack of authority reinforces the caveats expressed elsewhere in this Note, namely that the association should reserve the authority to make and amend the house rules in its governing documents, and be sure that the restriction is not prohibited by its own documents or some state or federal law.

To protect against claims of waiver and selective enforcement, the association should be sure to act swiftly and uniformly in enforcing the house rules. A claim of waiver arises where the association has been put on notice of some action, and yet fails to enforce the applicable restriction. *Mutual Redevelopment*

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<sup>113</sup> See *Wehunt*, 332 S.E.2d at 368.

<sup>114</sup> *Ziontz v. Ocean Trail Unit Owner's Ass'n*, 663 So. 2d 1334, 1335 (Fla. Dist. Ct. App. 1993).

<sup>115</sup> See *Wehunt*, 332 S.E.2d at 372.

<sup>116</sup> See *Ziontz*, 663 So. 2d at 1336.

<sup>117</sup> Even this decision was a close call. The decision to overrule the lower court was split. See *id.* at 1337 (revealing that even in this case there was a difference of opinion as to whether a \$60,000 award was reasonable); see also *Nottingdale Homeowners' Ass'n v. Darby*, 514 N.E.2d 702 (Ohio 1987) (awarding \$12,000 in attorney's fees in a case to collect \$2,500); *Park Place E. Condominium Ass'n v. Hovbilt*, 652 A.2d 781 (N.J. Super. Ct. Ch. Div. 1994) (permitting \$27,500 in counsel fees in an assessment collection matter).

<sup>118</sup> See, e.g., *Stewart v. Kopp*, 454 S.E.2d 672 (N.C. Ct. App. 1995).

<sup>119</sup> See *supra* Part II (discussing the authority of associations to assess the unit owner).

<sup>120</sup> See *Mutual Redevelopment Houses, Inc. v. Hanft*, 249 N.Y.S.2d 988 (Civ. Ct. 1964); 2A ROHAN & RESKIN, *supra* note 21, § 11.09, at 11-17.



*Houses, Inc. v. Hanft*,<sup>121</sup> a case involving a cooperative association, is demonstrative of the theory, though not necessarily controlling.<sup>122</sup> In *Mutual Redevelopment Houses*, the cooperator discovered the prohibition of pets while at the closing, after paying for a portion of his stock and lease.<sup>123</sup> His attorney notified the cooperative association, in writing, that the unit owner would keep his dog, and the owner made no attempt to hide the pet while living in the co-op.<sup>124</sup> The court held that the association had waived the prohibition of pets for this cooperator since over five months had passed before the association attempted to enforce the rule.<sup>125</sup>

A successful claim of selective enforcement will depend largely on the specific facts of the case. In many instances, however, the association is given the benefit of the doubt so long as it can assert a valid reason for any disparity in application.<sup>126</sup> As with enforcement of the law, enforcement of the by-laws and house rules by the association is reasoned to be for the ultimate benefit of all.<sup>127</sup>

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<sup>121</sup> *Hanft*, 249 N.Y.S.2d at 988.

<sup>122</sup> It is unclear exactly how these facts would translate over in the case of a condominium. While cooperative associations generally have more freedom to act than condominium associations because of the lessor-lessee nature of the relationship, a court may be wary of allowing an exception in the case of a condominium unit, where the fee estate owned is more secure than the leasehold interest held by the cooperator.

<sup>123</sup> *Hanft*, 249 N.Y.S.2d at 1046.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See 1A ROHAN & RESKIN, *supra* note 21, § 44.06[3]. For example, a provision which is applied only prospectively may be held valid even though it creates two classes of individuals—those who are “grandfathered” and those who are not. See *Chattel Shipping and Inv., Inc. v. Brickell Place Condominium Ass’n*, 481 So. 2d 29 (Fla. Dist. Ct. App. 1985). In addition, absent some official showing of the association’s reasoning, the court may come to a different conclusion. See *Hidden Harbour Estates v. Basso*, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981) (finding that the evidence at trial contradicted all of the board’s grounds for refusing the unit owner’s request and, therefore, the by-law provision would not be enforced).

Keep in mind, however, that enforcement remains subject to the general requirement that the provision must be authorized (and not prohibited) by the by-laws. See *Barnett & Klein Corp. v. President of Palm Beach (A Condominium)*, 426 So. 2d 1074, 1075 (Fla. Dist. Ct. App. 1983). The court, in *Barnett & Klein*, found that a house rule creating two classes of unit owners was ultra vires due to a by-law requiring that all rules and regulations “be equally applicable to all members, and uniform in their application and effect.” *Id.*

<sup>127</sup> See *O’Connor v. Village Green Owners Ass’n*, 182 Cal. Rptr. 111, (Ct. App. 1982) (finding that “enforcement . . . fosters condominium development by attracting buyers seeking a stable, planned environment . . . [and] also protects the [rights

## V. SUGGESTIONS TO THE CONDOMINIUM ASSOCIATION

The first step the developing condominium association should take is to check the applicable statutes in the relevant jurisdiction and ensure that the provisions it wishes to enact are permitted, or not specifically prohibited, by the enacting statutes. Assuming no bars on the statutory level, the association should then provide itself the authority to enact house rules and other restrictions in the governing documents, including the declaration of condominium and by-laws. It should similarly provide itself with the authority to amend the by-laws and house rules, without notice.<sup>128</sup> The association should also include in its by-laws the ability to recover its costs and attorney's fees, as well as any assessments for non-compliance with the rules. In addition, the association should post a copy of the by-laws and house rules in the association office or in a common area, and periodically distribute copies of the house rules to the unit owners.

In adopting a use restriction, the association should keep a record of its reasoning, so that if necessary it can demonstrate to the court that its actions were not arbitrary. The reasons for adopting a particular restriction could include advice from an independent outside source, which the board should consider consulting. The association should consider all of the factors which will contribute to its costs, and plan any assessments for non-conformity accordingly. The monetary sanctions may be assessed on a per day basis, but should not be so high that the assessment could be considered an impermissible penalty. If the unit owner remains non-compliant, other action should be taken to prevent the continually accruing assessments from reaching a level at which the court may characterize them as an attempt by the association to penalize the unit owner.

Violations should be addressed quickly and uniformly, to

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of those] who may pay a premium to obtain restrictions") (quoting Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 653 (1981), *vacated on other grounds*, 662 P.2d 427 (Cal. 1982); see also Wayne S. Hyatt, *The Community Association: An Introduction*, 2 MODERN REAL ESTATE TRANSACTIONS 789, 795 (ALI/ABA Course of Study Materials 1987) (discussing the importance of good faith in rule enforcement).

<sup>128</sup> Even though the association should retain the right to amend the by-laws and house rules without notice, the association should nevertheless provide adequate notice to the unit owners, as a deprivation without notice could be considered a violation of due process. See Hyatt, *supra* note 127, at 792 (stating that the governmental role of an association creates the obligation for it to act with sufficient regard for due process and equal protection principles).

prevent defenses of waiver or selective enforcement. The association should provide adequate notice to the unit owner, in the form of multiple notices to act. For example, the association should notify the unit owner that compliance must be met within 30 days, in order to avoid certain specified consequences. Similar warning should be communicated 15 days later and so forth until the date on which action commences. Such warnings also help the association to demonstrate that it has given the unit owner every opportunity to comply, and is therefore coming into court with "clean hands."

### CONCLUSION

Over time, any market must change to meet the needs of its consumers. In the market of community living, there is a need to own something free and clear—a fee estate which the unit owner can call her own. While the satisfaction of this need has posed certain problems for associations dealing with a recalcitrant unit owner, there is no reason why an association which has been properly organized should find itself inadequately prepared to deal with even the unruliest of owners. Evicting a condominium unit owner may continue to be as difficult as expelling an annoying neighbor in the house next door. However, the methods outlined in this Note should help to ensure that a unit owner does not frequently or permanently overstep the bounds.

Of course, the most valuable tool in addressing "recalcitrants" could be to create an association review board to effectively screen out a suspect applicant in the first place. An ounce of prevention is worth a pound of cure.

*Michael R. Fierro\**

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\* The author would like to thank his wife for her support (both emotionally and financially) through law school, and in the years to come, as well as thank Marta and the rest of the Law Review staff for their insights and assistance in bringing this piece to publication.